

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Mark J. Cavanagh, Presiding Judge

RONALD M. NASTAL
IRENE NASTAL
Plaintiffs-Appellees,

v

Docket no. 125069

HENDERSON & ASSOCIATES INVESTIGATIONS, INC.
NATHANIEL STOVALL
ANDREW CONLEY
Defendants-Appellants.

BRIEF ON APPEAL - AMICUS CURIAE MICHIGAN SELF-INSURERS' ASS'N



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STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT

The Court has jurisdiction to review the opinion which was entered by the Court of Appeals in *Nastal v Henderson & Assocs Investigations, Inc*, unpublished opinion of the Court of Appeals, decided on October 23, 2003 (Docket no. 241200) by the authority of the Michigan Court Rules of 1985, MCR 1.101, et seq. MCR 7.301(A)(2). MCR 7.302(C)(2)(b).

The application for leave to appeal was filed with the Court within twenty-one days after the opinion of the Court of Appeals was entered.

STATEMENT OF QUESTION PRESENTED

I

WHETHER A PRIVATE DETECTIVE STILL HAS A LEGITIMATE PURPOSE FOR CONTINUING WITH THE COVERT SURVEILLANCE OF A PLAINTIFF AFTER HAVING BEEN DISCOVERED.

Plaintiffs-appellees Ronald M. Nastal and
Irene Nastal answer "No."

Defendants-appellants Henderson & Assocs,
Nathaniel Stovall, and
Andrew Conley answer "Yes."

Amicus curiae Michigan Self-Insurers' Ass'n answers "Yes."

Court of Appeals answered "No."

Circuit Court answered "No."

STATEMENT OF FACTS

Defendant-appellant Nathaniel Stovall and defendant-appellant Andrew Conley (Private Detectives) were directed by defendant-appellant Henderson & Associates Investigations, Incorporated (Detective Agency) to observe and report any public activity of plaintiff-appellee Ronald M. Nastal (Plaintiff) that might confirm or contradict those claims that had been made in a civil action for money damages because of a personal injury which was opposed by Citizens Insurance Company (Defendant). (15a-16a)

Plaintiff discovered the surveillance when followed in traffic by the Private Detectives one day. (16a) The surveillance continued and Plaintiff discovered this too. (16a-17a)

Plaintiff then filed a civil action with the Circuit Court for the Third Judicial Circuit of the State of Michigan (Trial Court) claiming money damages from the Private Detectives, the Detective Agency, and the Defendant for defamation, intentional infliction of emotion distress, negligence, and stalking because of the surveillance. (17a) The Private Detectives, the Detective Agency, and the Defendant appeared and denied responsibility.

Discovery was conducted and completed. (17a)

The Trial Court decided to allow Plaintiff to proceed with only a claim against the Defendant for negligence and a claim against the Private Detectives and the Detective Agency for negligence and stalking by dismissing all of the other claims on summary disposition. *Nastal v Henderson & Assocs Investigations, Inc*, unpublished order of the Circuit Court for the Third Judicial Circuit of the State of Michigan, decided on April 23, 2002 (Docket no. 00-030589-NZ). (13a-14a, 17a)¹

The Court of Appeals affirmed the decision by the Trial Court allowing the claim against the Private Detectives and Detective Agency for stalking the Plaintiff but reversed the decision by the Trial Court allowing the claim against the Private Detectives and

¹ The Defendant then settled with the Plaintiff and was dismissed. (17a-18a)

Detective Agency for negligence. *Nastal v Henderson & Assocs Investigations, Inc*, unpublished opinion of the Court of Appeals, decided on October 23, 2003 (Docket no. 241200). (19a-20a)

The Court granted leave to appeal. *Nastal v Henderson & Assocs Investigations, Inc*, 470 Mich 870; - NW2d - (2004). (35a)

ARGUMENT

I

A PRIVATE DETECTIVE STILL HAS A LEGITIMATE PURPOSE FOR CONTINUING WITH THE COVERT SURVEILLANCE OF A PLAINTIFF AFTER HAVING BEEN DISCOVERED.

Two statutes in the Michigan Penal Code (Penal Code), MCL 750.1, et seq., provide a definition of *stalking*. MCL 750.411h(1)(d). MCL 750.411i(1)(e). Each of these statutes states that, "[s]talking' means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

Some of the words in this definition of *stalking* are defined by statutes. The words *course of conduct* are defined by section 411h(1)(a) and section 411i(1)(a). Each one of these statutes states that, "[c]ourse of conduct' means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose."

Victim is defined by section 411h(1)(f) and section 411i(1)(g). Each one of these statutes states that, "[v]ictim' means an individual who is the target of a willful course of conduct involving repeated or continuing harassment."

And *harassment* is defined by section 411h(1)(c) and section 411i(1)(d). These statutes effect a definition of *harassment* in two ways. First, these statutes establish a general definition by stating that, "[h]arassment' means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause

a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." Section 411h(1)(c), first sentence. Section 411i(1)(d), first sentence.

This is a general definition as it is a description of only one specific kind of *harassment* with the text *includes, but is not limited to*.

The words *conduct* and *victim* are defined by section 411h(1)(a) and (f) and section 411i(1)(a) and (g). The words *unconsented contact* and *emotional distress* are defined by section 411h(1)(b) and (e) and section 411i(1)(c) and (f) which state that,

"[e]motional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

* * *

'Unconsented contact' means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

- (i) Following or appearing within the sight of that individual.
- (ii) Approaching or confronting that individual in a public place or on private property.
- (iii) Appearing at that individual's workplace or residence.
- (iv) Entering onto or remaining on property owned, leased, or occupied by that individual.
- (v) Contacting that individual by telephone.
- (vi) Sending mail or electronic communications to that individual.
- (vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual."

The other way in which a definition of *harassment* is effected by section 411h(1)(c) and section 411i(1)(d) is by specific exclusion. Section 411h(1)(c), second sentence, and section 411i(1)(d), second sentence, actually exclude two specific kinds of activity from the general definition of *harassment* by stating that, "[h]arassment does not include constitutionally protected activity or conduct that serves a legitimate purpose."

Section 411h(1) and section 411i(1) do not provide any description of *constitutionally protected activity* or *legitimate purpose*. No statute in the Penal Code provides any description of *constitutionally protected activity* or *legitimate purpose*. Indeed, no statute does.

The absence of an actual description of *constitutionally protected activity* and *legitimate purpose* requires exposition by the Court. *People v Smith*, 246 Mich 393; 224 NW 402 (1929). *W S Butterfield Theatres, Inc v Dept of Revenue*, 353 Mich 345; 91 NW2d 269 (1958). *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002). *Stanton v City of Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002). In the case of *Smith*, *supra*, 396, the Court aptly observed that,

"[w]e do not intend to split hairs over the meaning of the term, and would feel bound to accept a legislative definition, if indulged, even though at variance with common understanding and all lexicographers, but when the legislature employs a common term as indicative of the purpose of an enactment, without further definition or designation, we must let the term speak its ordinary sense."

In the case of *Robertson*, *supra*, 748, the Court expressly observed that, "[u]nless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning. See MCL 8.3a. See also, *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997)."

Most recently, the Court again said in the case of *Stanton*, *supra*, 617, "because the motor vehicle exception does not provide a definition of 'motor vehicle,' we are required to give the term its plain and ordinary meaning. MCL 8.3a; *People v McIntyre*, 461 Mich 147, 153; 599 NW2d 102 (1999)."

A statute in the Penal Code establishes the process for exposition by the Court. MCL 750.2. Section 750.2, second sentence, states that, "[a]ll provisions of this act shall be construed according to the fair import of their terms, to promote justice and effect the objects of the law."

This process of exposition is the same as that which is prescribed statutes that are not included in the Penal Code as MCL 8.3a states that, "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." In the case of *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997), the Court cited this statute for the process of explaining and pronouncing the meaning of a statute in the Penal Code when stating that,

"[i]n interpreting a statute, words are to be given their common, generally accepted meaning. MCL 8.3a; MSA 2.212(1); *Hawley v Snider*, 346 Mich 181, 185; 77 NW2d 754 (1956). Furthermore, when terms are not expressly defined by a statute, a court may consult dictionary definitions. See *In re Forfeiture of Bail Bond*, 209 Mich App 540, 544; 531 NW2d 806 (1995)."

Constitutionally protected activity and conduct that serves a legitimate purpose are two different kinds of activity that cannot constitute *harassment* because of the word *or* in *constitutionally protected activity or conduct that serves a legitimate purpose*. (emphasis supplied) *Or* is a dissociative conjunction that allows a choice between two or more objects. *The American College Dictionary* (Random House 1964). It is not a single description with one subject, *constitutionally protected activity*, only one particular kind of the other subject, *conduct that serves a legitimate purpose*.

The text of section 411h(1)(c), second sentence, and section 411i(1)(d), second sentence, would have to be redacted by the Court to establish only one subject. To effect one subject, the statutes would have to have added text to make *constitutionally protected activity* a specific kind of *conduct that serves a legitimate purpose*. That is, by adding the word *other* so the statute reads,

Harassment does not include constitutionally protected activity
conduct that serves ^{or other} a legitimate purpose

Adding *other* to change the text from *or to or other* would change the meaning of the statutes from plural to singular because of the rule of ejusdem generis. See *Weakland v Toledo Eng'g Co, Inc*, 467 Mich 344; 656 NW2d 175 (2003).

As it is, section 411h(1)(c), second sentence, and section 411i(1)(d), second sentence, uses *or* and not *or other* which means that there are two discrete pursuits that were included in the exemption.

Constitutionally protected activity has a plain meaning in the law. It is any activity recognized and protected by either the Constitution of the United States, US Const, Am I - X, or the Michigan Constitution, Const 1963, Art I, sec 1. I (2) - (20), as both are constitutions and both recognize the rights of people which are protected from infringement by any statute in the Penal Code. Indeed, MCL 750.411h(2)(a) - (c) and MCL 750.411i(2)(a) - (d) would be void without the exclusion for *constitutionally protected activity*. *Marbury v Madison*, 5 US (1 Cranch) 137; 2 Led 60 (1803). *WPW Acquisition Co v City of Troy*, 466 Mich 117, 124-125; 643 NW2d 564 (2002).

Examples of *constitutionally protected activity* exempt from the general definition of harassment by section 411h(1)(c), first sentence, and section 411i(1)(d), first sentence, might include picketing at a clinic providing abortions or confronting witnesses at a criminal trial. Picketing is protected by US Const Amend I as speech. Confronting a witness at a criminal trial is protected by Const 1963, Art I, sec 1. I (20), third clause.

Conduct that serves a legitimate purpose also has a plain meaning. The fair import of *legitimate* is *sanctioned by law*. The common and approved meaning of *legitimate* is *sanctioned by law or custom, lawful and allowed*. *Webster's Dictionary of the English Language Unabridged* (Encyclopedic Ed) (J G Ferguson Pub Co, 1977). *The American College Dictionary*.

This meaning of *harassment* in section 411h(1)(c), second sentence, and section 411i(1)(d), second sentence, applies when a criminal action for *stalking* is presented by the terms of section 411h and section 411i that each state that, "[a]s used in this section."

And this same meaning of *harassment* in section 411h(1)(c), second sentence, and section 411i(1)(d), second sentence, applies when a civil action for money damages from *stalking* is presented by the terms of a statute in the Revised Judicature Act of 1961 (RJA), MCL 600.101, et seq. MCL 600.2954. Section 2954(1), first sentence, actually refers to or tie-bars section 411h and section 411i of the Penal Code by stating that,

"[a] victim may maintain a civil action against an individual who engages in conduct that is prohibited under section 411h or 411i of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.411h and 750.411i of the Michigan Compiled Laws, for damages incurred by the victim as a result of that conduct."

The surveillance by the Private Detectives was *conduct that serves a legitimate purpose* by the fair import of the word *legitimate* as *sanctioned by law* and *allowed*. First, it was carried out by people who were actually allowed to do this by law. The Private Detectives and the Private Detective Agency were *sanctioned by law* having been licensed by the State by the terms of the Private Detective License Act of 1965 (Detective License Act). MCL 338.821, et seq.

Second, the conduct of the Private Detectives in observing the location and movement of the Plaintiff was *sanctioned by law* as activity expressly allowed by the Detective License Act. MCL 338.822(b)(i) - (v). Section 822(b)(ii) and (v) of the Detective License Act states that,

"'[p]rivate detective' or 'private investigator' means a person, other than an insurance adjuster who is on salary and employed by an insurance company, who, for a fee, reward, or other consideration, engages in business or accepts employment to furnish, or subcontracts or agrees to make, or makes an investigation for the purpose of obtaining information with reference to any of the following:

* * *

(ii) The identity, habits, *conduct*, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity, *movement*, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.

* * *

(v) *Securing evidence to be used before a court, board, officer, or investigating committee.*" (emphasis supplied)

Plainly, the people and the purpose of the activity of the people in this case were actually sanctioned or allowed by the terms of the Detective License Act and so excluded from the definition of *harassment* as conduct that serves a *legitimate purpose*.

The Court of Appeals has recognized this. *Saldana v Kelsey-Hayes Co*, 178 Mich App 230; 443 NW2d 382 (1989).

The Court of Appeals misapprehended the evidentiary record in this case when stating that, "[the Private Detectives] and [a] supervisor . . . all testified that once the subject of the surveillance discovered that he was being followed, the surveillance activity served no purpose . . ." *Nastal v Henderson & Assocs Investigations, Inc*, unpublished opinion of the Court of Appeals, decided on October 23, 2003 (Docket no. 241200), slip op., 5. What the Private Detectives actually said was that further surveillance *at the time of discovery* served no purpose. That was why surveillance ended there-and-then. The Private Detectives did NOT say that resuming surveillance at a later time would serve no purpose. Indeed, the Private Detectives said that the resumption of surveillance at a later time would be helpful to learn the conduct and movement of the Plaintiff at that later time when he thought that the "coast was clear." (104a-105a) This was certainly true as many people revert to established patterns of conduct soon after having been the subject of public attention as the rates of recidivism for poor driving, drug use, and robbery reflect. The idea that people do not pursue conduct after having been the subject of public attention defies common experience.

The continued surveillance of the Plaintiff by the Private Detectives after having been discovered had the very same *legitimate purpose* as before which was to observe the conduct and movements of the Plaintiff to use as evidence in defending the lawsuit against the Defendant as allowed by the Detective License Act.

RELIEF

Wherefore, amicus curiae Michigan Self-Insurers' Association prays that the Supreme Court reverse the opinion of the Court of Appeals.

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